



February 1, 2002

Ms. Paula A. Jones
General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2002-0496

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158046.

The Employees Retirement System of Texas (the "system") received a request for information relating to contracts with BlueCross BlueShield of Texas ("BlueCross") and Merck-Medco Managed Care, L.L.C. ("Merck-Medco").¹ You state that the system has released some of the responsive information. You also state that the requested information that relates to BlueCross was released in response to a previous request for information. We therefore assume that the system also has released the BlueCross information to this requestor. If not, then the system must do so at this time. See Gov't Code §§ 552.006, .301, .302. You notified Merck-Medco of this request for information and of its right to submit arguments as to why information relating to Merck-Medco should not be released.² We have considered the comments that were submitted to this office on behalf of Merck-Medco and have reviewed the responsive information that the system submitted.

¹You state that to the extent the present request is for any contractual information relating to a BlueCross or Merck-Medco subcontractor, the system believes that such information is solely in the possession of BlueCross or Merck. We take this statement to mean that the system neither holds nor has access to any subcontractor information that may exist. We note that chapter 552 of the Government Code does not require a governmental body to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that receives the request for it. See Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989).

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

You indicate that virtually all of the requested information that relates to the Merck-Medco contract is addressed in Open Records Letter No. 2001-4296 (2001). Open Records Letter No. 2001-4296 (2001) is the subject of a pending lawsuit against this office over the release of information relating to Merck-Medco. Therefore, we do not address the information relating to Merck-Medco that is at issue in the pending litigation and will allow the trial court to resolve the issue of whether this information must be released.

You also inform us that four responsive documents relating to Merck-Medco are not involved in the pending litigation.³ Accordingly, we will consider whether these documents are excepted from disclosure. Merck-Medco has submitted no arguments that pertain to these documents and thus has not shown that they must be withheld from disclosure. Therefore, as the system takes no position with respect to these documents, they must be released. See Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (attorney general will grant exception to disclosure under Gov't Code § 552.110(a) if governmental body takes no position, private party makes *prima facie* case that information qualifies as trade secret, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise that raises Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

³As described in your letter dated January 29, 2002, these documents are (1) an October 1, 1998 letter to Daniel Stewart from Ed Hulsey and Roger Holland; (2) pages 2-4 of Merck-Medco's response to a follow-up questionnaire, covering questions 4 through 12; (3) an October 16, 1998 letter to Mr. Hulsey from Mr. Stewart; and (4) an October 19, 1998 letter to Mr. Stewart from Mr. Hulsey.

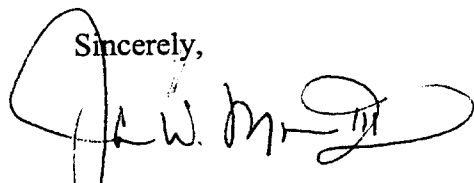
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 158046

Enc: Submitted documents

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